

**COMMENTS ON PROPOSED REVISIONS TO LSC REGULATIONS
PART 1611 – FINANCIAL ELIBILITY
SUBMITTED BY
THE CENTER FOR LAW & SOCIAL POLICY
ON BEHALF OF
THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION**

December 23, 2002

These comments are submitted to the Legal Services Corporation (LSC) by the Center for Law and Social Policy (CLASP) on behalf of the National Legal Aid and Defender Association (NLADA). NLADA is a membership organization that represents civil legal services programs, including those funded by LSC. CLASP serves as counsel to NLADA.

On November 22, 2002, LSC published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* (67 FR 70376) for Part 1611 (Financial Eligibility) of the LSC regulations. The NPRM seeks comments on the proposal. Comments are due on December 23, 2002.

The NPRM is the product of a negotiated rulemaking (reg-neg) process that was begun almost a year ago when LSC convened a reg-neg working group that included representatives from NLADA and CLASP as well as numerous representatives from field programs, LSC and OIG staff, and the American Bar Association's Standing Committee on Legal Aid & Indigent Defendants (SCLAID). The primary purpose of the reg-neg process was to develop a proposal to revise Part 1611 that would simplify and clarify the rules relating to financial eligibility and eliminate unnecessary administrative and compliance burdens on LSC recipients.

With the exception of major two issues, the working group reached a consensus on the version of the NPRM that was presented to the LSC Operations and Regulations Committee at its November 8, 2002 meeting. The field representatives on the reg-neg Working Group urged the Committee to eliminate the section of the proposed rule requiring retainer agreements and other client notices and to revise and expand the provision on group representation. The Committee considered the draft NPRM and recommended its adoption by the LSC Board with the revisions proposed by the field representatives. The Board considered the revised NPRM at its November 9, 2002 meeting, and directed the LSC staff to publish it for notice and comment.

The NPRM represents a major revision of Part 1611 and, if adopted as a final rule, will be a significant improvement over the current rule. It effectively addresses most of the significant concerns that field representatives raised in the reg-neg process, as well as many of those brought up by the LSC staff. The NPRM completely reorganizes Part 1611, to make it simpler, clearer and easier

for recipients and their staffs to apply and for LSC to enforce. The proposed rule provides additional flexibility and discretion for recipients to determine whether a particular applicant for service is eligible for LSC funded assistance. In addition, the NPRM eliminates numerous unnecessary administrative requirements that have proven to be burdensome for recipients and difficult for LSC to enforce, including the retainer agreement requirement, and the submission to and approval by LSC of numerous program guidelines and forms. Finally, the NPRM significantly expands the circumstances under which recipients may provide legal assistance to group clients. NLADA strongly supports the NPRM and, with the additional revisions described below in the section-by-section analysis, urges LSC to adopt it as a final rule.

KEY ISSUES

There were two major issues that were discussed in the reg-neg working group, but do not appear in the text of the proposed rule. First, the proposed rule eliminates the retainer agreement requirement that appears in §1611.8 of the current rule. Although NLADA agrees that retainer agreements may be appropriate and highly desirable under certain circumstances, we believe that the decision whether or not to use a retainer should be made by the recipient, rather than by LSC, consistent with the needs of the specific case and client and the requirements of the local rules of professional responsibility. The LSC Board agreed with the field representatives that LSC should not impose unnecessary administrative requirements, including a retainer agreement requirement, which would increase the compliance burden on both LSC staff and recipients without a statutory mandate or other compelling reason to do so. NLADA strongly supports the NPRM's elimination of the retainer agreement requirement that appears in the current rule.

Second, the Office of Inspector General representative to the reg-neg working group urged the incorporation into the rule of the language of section 509(h) of the LSC appropriations act that gives LSC auditors and monitors access to eligibility records and client names as well as certain other records unless they are protected by the attorney-client privilege. The final version of the NPRM eliminated any reference to access to records, although there is a lengthy discussion in the Supplementary Information of the rationale for the decision to not include the statutory language in the text of the rule. NLADA strongly supports the decision not to incorporate the statutory access to records provision into the rule. The complex issues relating to interpretation of the provisions on LSC's access to client records should not be cavalierly addressed without substantial discussion and reflection, and will be better addressed through a separate process.

The final key issue is the revision of the section on group representation. Under the current Part 1611, recipients are only permitted to use LSC funds to represent groups that are primarily composed of LSC eligible clients. LSC has

narrowly interpreted this provision to mean that at least a majority of a group's membership must be LSC eligible. Field program representatives on the reg-neg working group urged that the rule be revised to expand the circumstances under which a recipient could represent a group. The field proposal was modeled on language that appeared in the pre-1983 version of Part 1611. The LSC Operations & Regulations Committee recommended that the Board adopt the field proposal and the Board agreed. The NPRM incorporates the field proposal in its entirety.

NLADA strongly supports the group representation provisions that appear in the NPRM as part of the final version of Part 1611 and urges LSC to retain them in the final version of Part 1611. Representation of community groups that serve the low-income community is an essential element of the work of legal services programs. In many areas, group representation may be the only effective way to solve the problems facing communities or individuals. For example, hunger is often better addressed by assisting in the formation of a food bank rather than by representing hungry individuals. A tenant organization may be in a position to raise issues that individual tenants could not, for fear of retaliation. An organization of parents is better able to address educational policies that affect low-income children than an individual parent. Representation of community economic development corporations can address a host of issues that will improve the quality of life for low-income residents of the community. In many instances it may be impossible to demonstrate that the majority of the members, or the governing body, of such a group is comprised of eligible clients. Under the NPRM, recipients may use LSC funds serve such groups as long as the groups can demonstrate that they cannot afford to hire private legal counsel. NLADA urges LSC to include this version of the group representation provision in the final rule.

SECTION-BY-SECTION ANALYSIS OF REVISIONS

Section 1611.1 Purpose: NLADA supports the revisions to the Purpose section.

Section 1611.2 Definitions: We generally support the revisions that were made in the Definitions section. We believe that they help clarify the terms used in the rule and make the rule easier to apply. We are particularly supportive of the new definition of "assets" that eliminates the distinction in the current rule between liquid and non-liquid assets and provides more practical guidance on the kinds of assets that should be considered in determining eligibility.

LSC specifically invited comments on the issue of whether "income" should be defined as gross income or income net of payroll taxes. The field representatives on the reg-neg working group argued that payroll taxes should be deducted from gross income for purposes of determining whether an applicant for service is eligible under the program's annual income ceiling or may be

served under the exceptions to the annual income ceiling. Because our client community now includes many more working poor whose disposable income may be substantially reduced by payroll taxes that are involuntarily withheld from their paychecks, we believe that the definition of "income" should be revised to reflect income net of payroll taxes rather than gross income. This change would expand the pool of potential clients slightly by permitting recipients to serve those working poor whose income is marginally above the current upper limit on income. We urge LSC to adopt a definition of "income" that permits payroll taxes to be deducted from gross income before determining whether an applicant's income is below the program's annual income ceiling or below 200% of poverty for purposes of applying the exceptions to the annual income ceiling.

Section 1611.3 Financial Eligibility Policies: NLADA generally supports this new section that is based on requirements found in several disparate sections of the current rule. There are numerous revisions that substantially improve the rule, including the provision that permits recipients to determine that an applicant is financially eligible based on the applicant's eligibility for another low-income governmental benefits program. Under the new rule, recipients would no longer be required to submit their asset levels to LSC, and recipients may permit waivers of assets ceilings under a more flexible standard than is permitted under the current rule.

With regard to assets, the new provision provides an expanded list of assets that may be excluded from consideration. The field representatives on the reg-neg working group urged that these exclusions should be treated as illustrative rather than exhaustive, so that other exclusions could be considered by recipients if appropriate in their client communities. LSC rejected that position, but seeks comments on that issue as well as suggestions for other specific assets that should be added to the list of possible exclusions. NLADA believes that recipients should have flexibility to determine those assets that should be excluded from consideration, and we urge LSC to adopt that position in the final version of the rule

Section 1611.4 Financial Eligibility for Legal Assistance: This section of the proposed rule sets forth the basic eligibility criteria for LSC-supported legal assistance. Substantively, it is consistent with provisions found in the current rule. However, the proposed section makes the process of determining basic eligibility (i.e., below 125% of the Federal Poverty Level) much less complex than it is under the current rule. The principal substantive change is the addition of a provision that permits a recipient to determine that an applicant is eligible for service without making an independent determination of income and assets if the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the government program has an asset test and its income standards are at or below 125% of the Federal Poverty Level. NLADA supports this addition and urges LSC to adopt this section as it appears in the NPRM.

Section 1611.5 Authorized Exceptions to the Annual Income Ceiling:

This section of the rule has been revised substantially under the NPRM. It deals with those instances where a recipient may serve an applicant whose income exceeds the recipient's annual income ceiling. Under the proposal there are two situations where a recipient may serve an applicant whose income is above the recipient's annual income ceiling without regard to any absolute upper limit on income.

First, a recipient may provide legal assistance where an applicant has been receiving governmental benefits for low-income individuals and families and seeks legal assistance to maintain those benefits, regardless of income. It will permit recipients to assist the working poor whose income is supplemented by public benefits to retain those benefits even if their total income exceeds the LSC limits. NLADA supports the inclusion of this new provision.

Second, where an applicant's income is primarily devoted to medical or nursing home expenses, a recipient may represent the applicant as long as the Executive Director or designee determines that, after deducting those expenses from income, the applicant would be financially eligible for services. This provision is a revised version of a section in the current regulation. NLADA supports the revision, although we would prefer that the Executive Director or designee not specifically be required to make the determination. WE do not see why the Executive Director or designee should be required to make this determination, when the rule does not specify who is required to make other comparable decisions.

Under the current regulation, recipients may serve applicants whose income is above 125% of poverty, but does not exceed 187.5% of the Federal Poverty Level under certain circumstances. Under the proposed rule the outside income limit is raised to 200% of the Federal Poverty Level, slightly expanding the pool of applicants who may be eligible for LSC-funded services. The NPRM retains the exceptions included in the current rule, although several are simplified and clarified. In addition, the new rule permits recipients to serve individuals with incomes up to 200% of poverty who are seeking to obtain or maintain governmental benefits for persons with mental and/or physical disabilities. NLADA supports these revisions, and we urge LSC to include them in the final version of Part 1611.

Under the current rule the exception for "fixed debts and obligations" explicitly includes unpaid taxes as a fixed debt, but has been interpreted to exclude current taxes, including those withheld from income. The current rule discriminates against the working poor whose available income is reduced by the amount of current payroll taxes. Those whose income comes from another source which is not subject to payroll taxes are treated more favorably under the current rule. The proposed rule eliminates the reference to past taxes and the

Supplementary Information that accompanies the rule makes it clear that current taxes are to be considered to be a "fixed debt." Although NLADA prefers that payroll taxes be excluded from income in the first instance, if LSC does not concur with that view, we support the change that permits current taxes to be treated as a factor to support an exception to the annual income ceiling. LSC has invited comments on this issue, and we support the treatment of payroll taxes as deductions from income or, alternatively, as fixed obligations.

In addition to current taxes, the Supplementary Information notes that LSC intends to treat rent in the same way that it has traditionally treated mortgage payments in the past. Both will be treated as "fixed debts or obligations" that may be considered in determining whether to serve an applicant whose income exceeds the recipient's annual income ceiling but is below 200% of poverty. NLADA supports this change. Field programs representatives on the reg-neg working group also urged LSC to consider basic utility costs as "fixed debts or obligations" that can be considered when determining whether to make an exception to the income ceiling. LSC argued that these expenses were not fixed as to time and amount and should not be included. LSC has asked for comment on whether utilities should be included within the category of fixed debts and obligations, or whether utilities or other factors should be added to the list to be considered when determining whether to make an exception to the income ceiling. NLADA urges LSC to give recipients broad discretion to determine which expenses, including utilities, should be considered under the rubric of "fixed debts and obligation." Although the exact amount may vary from month to month, payment for utilities is a basic obligation that an applicant for service is required to meet each month in order to ensure the health and safety of the applicant and his/her family, particularly in areas of the country where the climate is severe. In addition, some utility companies permit customers to pay a fixed amount each month based on average usage for the prior years' usage.

Section 1611.6 Manner of Determining Eligibility: There are two significant revisions to this provision. First, the current requirement that eligibility forms and procedures must be approved by LSC has been eliminated. Second, a provision has been added that permits one recipient to rely on the eligibility determination made by another recipient that referred a case. NLADA supports both of these revisions which help minimize the administrative burdens on recipients.

Section 1611.7 Change in Financial Eligibility Status: The NPRM adds language to this section to address the situation where a recipient learns of information that indicates a client is not, in fact, financially eligible. The new provision of the rule is parallel to the current rule where there is a change in circumstances and would require that the recipient discontinue LSC-funded representation in a manner consistent with applicable rules of professional responsibility. NLADA supports this provision.

Section 1611.8 Representation of Groups: The field representatives on the reg-neg working group urged LSC to adopt provisions that would broaden the circumstances under which recipients could represent groups. As discussed above, the LSC Board adopted the field representatives' proposal, and it is incorporated into the NPRM. Under the NPRM, recipients may use LSC funds to represent groups that lack the means to obtain private counsel if (1) at least a majority of the group's members are financially eligible for LSC-funded assistance; (2) for a non-membership group, at least a majority of the individuals who are forming or operating the group are eligible clients; (3) the group has as its principal function or activity the delivery of services to eligible persons in the community; or (4) the group has as its principal function or activity the furtherance of the interests of eligible persons in the community. This revision is similar to the version of the group representation rule that was in effect before Part 1611 was revised in 1983.

NLADA believes that the expansion of the group representation provisions is critical to ensuring that LSC recipients have the capacity to adequately serve the low-income client community, and we urge LSC to retain in the final rule the group representation provisions that are included in the NPRM.

NLADA appreciates the opportunity to participate in the reg-neg process and to share these comments with LSC. If you have any questions or concerns about these comments, please feel free to contact NLADA's Counsel, Linda Perle at CLASP (202-906-8002 or lperle@clasp.org).